

DUTTON: ...EPA action under this bill.

JUNELL: We added price gouging as one of the laundry lists in 17.46 for in those instances when there is a natural disaster occurring. In other words, the floods in Houston, it may be unconscionable for somebody to be selling water at \$20 a gallon because you don't have potable water anywhere else. So we've added-- That is an additional protection to consumers.

DUTTON: OK. So whenever there's a natural disaster.

JUNELL: Yes sir.

DUTTON: Then that provision would kick in.

JUNELL: Yes sir.

DUTTON: Well let me ask you all something about the transactions. I mean, again, I think the bill says it limits or exempts all transactions over \$250,000 except those involving a residence.

JUNELL: Yes sir.

DUTTON: And that's in the bill?

JUNELL: Yes sir. And let me say there is going to be an amendment that raises that to \$500,000.

DUTTON: OK. And it also limits prejudgment interest?

JUNELL: Yes sir.

DUTTON: To what?

JUNELL: It doesn't apply to future damages. It only applies to your past damages. So that prejudgment interest wouldn't-- In other words, if the court awarded some sort of a future economic loss, it would not award prejudgment interest for that future economic loss.

DUTTON: OK. And as you well know, they usually award post-judgment interest.

JUNELL: That would apply to post-judgment interest until it would-- That's by another statute.

DUTTON: OK. Now, the effective date of the act. This does not apply retroactively, does it?

JUNELL: It applies and there is an effective date, and I believe there is an amendment -- causes of action. It will be similar to the same amendment that was on the Joint Several Bill that causes of action accrue after September 1, 1995.

DUTTON: But you've got to file it before--

JUNELL: In suits before September 1, but you have to file suit by September 1, 1996.

DUTTON: And then I understand then he's going to add an amendment on page 3 that takes this back to the language where it says to protect consumers?

JUNELL: Yes.

DUTTON: Thank you.

JUNELL: And Harold, the reason I kind of have-- We worked on different parts of this bill and so that's the reason I kind of need a little help every once in a while.

DUTTON: Well, thank you, Mr. Junell.

COMBS: Mr. Speaker.

SPEAKER: Mr. Combs and what purpose?

COMBS: Will the gentleman yield?

SPEAKER: Do you yield, Mr. Junell?

JUNELL: Of course, the fine gentlemen from Harris County.

SPEAKER: Gentlemen yields, Mr. Combs.

COMBS: Thank you, Chairman Junell. I just want to ask a couple of quick questions and establish for the record the Legislative intent and your floor substitute on construction and application. As you recall, Justice Mozey in an opinion several years ago--

JUNELL: Joe, first of all, I don't recall Justice Mozey and an opinion, but you can refresh my memory perhaps.

COMBS: Well, Justice Mozey said as a member of the Supreme Court in this opinion that when he was in the Senate he attempted to add an additional cause of action to the DTPA and failed on the floor of the Senate, so he was just going to do it from the bench at the Supreme Court. And I just want to establish for the record, is it your intent in the construction and application section of the bill to be sure that the courts do not expand and add additional causes of action to this legislatively created statutory scheme?

JUNELL: I could not have said it better, John. I agree with you 100%.

COMBS: You are not attempting to limit a consumer's ability to recover for the damages that are described in this act; you simply don't want the judges legislating from the bench and adding to the scheme that the Legislature has put together. Is that correct?

JUNELL: That's correct.

COMBS: Very good. One other question. And I want to reemphasize this for the membership because it's a I think not well understood part of the Deceptive Trade Practices Act, to reinforce that one of the most important sections of this bill, one of the most significant pieces of tort reform, I think, that will come out of this session, is you've ended the ability of the Board of Insurance to just adopt rules that can then be boot-strapped into the Deceptive Trade Practices Act and sued under. Is that correct?

JUNELL: That's right. And Representative Duncan did an excellent job in putting that information together.

COMBS: Thank you very much.

SOBRANIC: Mr. Speaker.

SPEAKER: Mr. Sobranic, what purpose?

SOBRANIC: Will the gentlemen yield?

JUNELL: Of course.

SPEAKER: Gentlemen yield, Mr. Sobranic.

SOBRANIC: Thank you. Junell, on this one, as far as the waiver provisions work...

JUNELL: Point me to a page that would be--

SOBRANIC: Let's start with page one.

JUNELL: All right. Thank you, Mr. Sobranic.

SOBRANIC: On a situation in the consumer transaction, how would you envision that waiver working?

JUNELL: Well, the waiver has to be in writing. The person has to be represented by an attorney. The waiver under this section must be conspicuous and in boldface type and make the limits-- set for the standards that are here as far as the type and exact language on page 2. And the attorney cannot have been directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

SOBRANIC: Do you envision in this situation that the attorney would have to accompany the consumer?

JUNELL: No.

SOBRANIC: What would happen? Would the-- in the transaction would the consumer go to the seller or whatever and receive his contract or whatever with this waiver provision and be told go take it to a lawyer and then come back?

JUNELL: That's my-- In fact there may be a separate provision, and it's not in our bill, but I could envision that someone who is doing a transaction like that may have someone sign and perhaps even an affidavit that I have contacted an attorney. It was not anyone that you did and based upon that advise I have signed this waiver. We're not requiring that in law, but I'm saying that might be a business decision that a business may decide to do.

SOBRANIC: OK. And as far as on page 3 on the construction and the application. On that section, how would you interpret that as it changes current law?

JUNELL: Well, there's going to be an amendment, and I'm going to read to you the amendment, if that would be helpful to you, the changes what's in the substitute.

SOBRANIC: So you're going to be changing that section?

JUNELL: Yes.

SOBRANIC: OK. Then I'll wait on that one.

JUNELL: OK.

SOBRANIC: Now, on page 4.

JUNELL: Yes sir.

SOBRANIC: Lines 14 through 16, you're striking under unconscionable actions or course of action Subsection B, "results in a gross disparity between the value received and the consideration

paid in a transaction involving transfer consideration." What causes of action are you getting rid of there that a person will not have access to any longer?

JUNELL: Personally, I don't think you're getting rid of any causes of action. But in every, and that's an exaggeration, not every DTPA case, but in lots of DTPA cases, you know, even if you sign a contract, even if you're a corporation with a corporation, this issue is one that is litigated ad nosium which about this gross disparity between value received and consideration paid. To me, and I think those of us that worked on this, as well as what is going on in the court system, that is a never ending cycle. There's no way to determine. I mean it's so subjective. I mean, everybody that comes forth says, well, I didn't-- there was a gross disparity. Well, what's the difference, what is gross? You know, and that's the whole problem. It is so vague and subjective there was no way for either business or consumer to be able to specify here, you know, "we've signed a contract, I had a lawyer, you had a lawyer and now you're saying let's break the deal and I'm going to threaten to sue you under the Deceptive Trade Practices Act."

SOBRANIC: Well, but I guess to really focus it though, is there any situation that can occur that would apply in a transaction that would not have some other available remedy under the codes?

JUNELL: I can't think that we're taking any remedy-- in fact, I don't think there's any remedy under this act that is being eliminated.

SOBRANIC: Thank you.

JUNELL: Thank you, Mr. Sobranic.

SEIDLITS: Mr. Speaker.

SPEAKER: Mr. Seidlits.

SEIDLITS: Would the gentleman yield?

SPEAKER: Do you yield Mr. Junell?

JUNELL: I will yield to Chairman Seidlits.

SPEAKER: Gentleman yields, Mr. Seidlits.

SEIDLITS: Rob, just as a follow-up to Mr. Culberson's question, it would be our intent by setting forth a statutory scheme, setting out causes of action under the Consumer Protection Act, that where we direct the court basically to not expand causes of action, we're also telling them by this statutory scheme not to restrict causes of action. Is that correct?

JUNELL: I think, Curtis, I think you and I agree, and I think the Members of this House agree that the courts should interpret the language as written. It's not ambiguous, and in many cases is not open to additional construction.

SEIDLITS: Right. Thank you.

PRICE: Mr. Speaker.

SPEAKER: Mr. Price, what purpose?

PRICE: Would the gentleman yield?

SPEAKER: Do you yield Mr. Junell?

JUNELL: I would certainly yield to my good friend from the golden triangle, Mr. Price.

SPEAKER: Gentleman yields, Mr. Price.

PRICE: Thank you, Mr. Junell. I just want to clarify something in relation to the unreasonable requirements for an inspection.

JUNELL: Is there a point or is there a page or specific language?

PRICE: It was on page 9 in the old one. I think it might be 12 in the new one.

JUNELL: All right, sir.

PRICE: It seems that the "reasonable" was stricken, and I'm just concerned about what would be the consequence?

JUNELL: I really, I wish I had a page number, Mr. Price. It would certainly make it easier for me, and I apologize. This thing is not like a lot of bills that kind of flows in order. It's kind of all over the place. So if I had a specific page and line it would make it a little bit easier for me to answer the question.

PRICE: It's under section 17505. OK. Here we go. On page 14.

JUNELL: Yes sir. I see where you're at.

PRICE: On page 14. And I'm concerned about the definition of "reasonable." Suppose the consumer considers that the request being made of the consumer is indeed unreasonable. The request is unreasonable.

JUNELL: Well, this, of course, this has been a prerequisite of filing suit for damages, and I guess the problem is let's say you claim damage to your house. First of all you have to file a notice letter under the DTPA. That's true under this bill as it was under existing law. You claim plumbing in your house was not done properly. Well, if the plumber wants to come out and look at it after they get this notice to be able to see, yes, this is something I did or your kids flushed, as mine did, toys down the commode or firecrackers or something of that nature, you get into this deal about what is unreasonably refuses. And so I think the question is if they refuse to do the inspection, then it gives someone an attempt. Because the whole purpose, and I wish it was in our whole litigation system, is to resolve these claims before there is ever a suit filed.

PRICE: OK. One other thing that I-- if it were covered, I missed it and I'd like to ask about. The fact that the consumer could only sue for actual damages.

JUNELL: No. It's going to be economic damages...

PRICE: Economic damages. I'm sorry.

JUNELL: ...except in cases where the jury finds that it was a knowing violation. This person knew what they were doing. This business knew what they were doing. They knew that their act that they were going to do was going to be a wrong act. In that case you can recover mental anguish.

PRICE: Is that substantially different from present law?

JUNELL: Yes sir, it is.

PRICE: OK. Thank you.

JUNELL: Yes sir.

DANBURG: Mr. Speaker.

SPEAKER: Ms. Danburg, what purpose?

DANBURG: May I ask joint author, Chairman Seidlits, a question, please?

JUNELL: I'll be glad to answer or whatever.

DANBURG: OK. This is on something that we've talked about at length committee.

SPEAKER: Gentleman yields, Ms. Danburg.

JUNELL: I yield.

DANBURG: Thanks. There's some language in here that has been in some versions of this legislation and not in others, and I wanted to see exactly what it means. On page 9, line 24, and page 10, the same language is repeated in a couple of instances. It says that there-- we're talking about professional advice. You and I as attorneys are giving professional advice, or a realtors giving professional advice, or a doctor's giving professional advice. And that is exempted from DTPA. But then it says that the exemption does not apply to express misrepresentation, unconscionable actions, real fraud that cannot be characterized as advice, judgment or opinion. What does that term, that cannot be characterized as advice, judgment, or opinion? How does that fit in there?

SEIDLITS: The reason we drafted it this way, as you were in committee and knew, is that we want to attempt to draw a line between what truly is professional advice, opinion, or judgment. That if I'm a lawyer or accountant or whatever professional giving opinions, advice, much the same as in the course and scope of employment type situation, then that would be exempted. But it has to be advice and opinion growing out of the profession. And it's an attempt to make a distinct line there between that type of action and a misrepresentation. As I mentioned earlier as we discussed in committee that if I make claims of my prowess as a stock broker or a stock analyst and make these representations that do not fall within advice, then it makes a bright line that, yes, you can still sue for that fraud, misrepresentation. And I can't just hide behind the fact that I say, "oh, that was really advice or opinion or judgment."

DANBURG: So if you were to say "in my opinion, so and so is the best doctor for you to hire. He has had a 100% success." You know, I'm a doctor, I'm doing a referral and I actually make fraudulent statements during that. I actually make misrepresentation. I'm getting kickbacks for it. If it's purely professional as compared to something I'm just saying, I said it as a professional opinion, but it wasn't.

SEIDLITS: That's correct. You can't just hide behind the cover of the advice, opinion or judgment. It has to be as a result of your professional license degree or your employment, your profession.

DANBURG: OK. It doesn't apply to theft. It doesn't apply to misrepresentations of fact. Unconscionable actions. When you're just trying to use that as an excuse for things that are not within our professional ethics at all.

SEIDLITS: That's right. And that's why we put it in the form of 1, 2, 3, 4 situation there, too.

SPEAKER: Following amendment to the amendment. The Clerk will read the amendment to the amendment.

CLERK: Amendment to the amendment by Hunter of Nueces.

SPEAKER: Chair recognizes Mr. Hunter of Nueces.

HUNTER: Mr. Speaker, Members, this is what Representative Sobranic was talking about on the construction. We're using the language basically from the present law and making sure it's clarified.

SPEAKER: Mr. Hunter set up an amendment to the amendment. Is there objection to the adoption to the amendment to the amendment? Chair hears none. The amendment to the amendment is adopted. The following amendment. The Clerk will read the amendment to the amendment.

CLERK: Amendment to the amendment on Hunter of Nueces.

SPEAKER: Chair recognizes Mr. Hunter.

HUNTER: This is just adding when we prepared the first one on construction we didn't get the entire area in, and we're making sure that this is specifically laid out in the construction.

SPEAKER: Make sure you can read the amendment on your screen. Is there objection to the adoption of the amendment? Chair hears none. Amendment is adopted. Following amendment to the amendment. The Clerk to read the amendment to the amendment.

CLERK: Amendment to the amendment of Hunter of Nueces.

SPEAKER: Chair recognizes Mr. Hunter of Nueces.

HUNTER: All right. Members, this is the effective date, and let me explain this. This act takes effect September 1, 1995, and applies to all causes of action that accrue on or after that date. This act also applies to all causes of action that accrued before the effective date of this act and upon which a suit is filed on or after September 1, 1996. And basically this involves the accrual language with the causes of action that accrued on or after that September 1 date.

COVINGTON: Mr. Speaker.

SPEAKER: Mr. Covington, what purpose?

COVINGTON: Will the gentleman yield?

SPEAKER: Do you yield Mr. Hunter?

HUNTER: Yes.

SPEAKER: Gentleman yields, Mr. Covington.

COVINGTON: Chairman Hunter, very briefly, I just want to establish for the record that the adoption of your previous amendment did not change in any way the Legislative intent that I was able to establish with Chairman Junell. Is that correct?

HUNTER: You are absolutely correct, and we'll make that clear. You and I had talked about it. Your intent is how I understand it.

COVINGTON: Thank you.

SPEAKER: Your objection to the adoption of the amendment. Chair hears none. The amendment is adopted. Mr. Brimer. The following amendment the Clerk to read the amendment.

CLERK: Amendment by Brimer.

SPEAKER: Chair recognizes Mr. Brimer.

BRIMER: Mr. Speaker, Members, I want to compliment my colleagues for their hard work and I want to get out of their way, but this is a problem I have to clear up. Last session I passed House Bill 2747, and it put a penalty for credit bureaus if the consumer could establish that they had an error in their report and wouldn't correct it timely. The problem was an unscrupulous or scrupulous, whatever you want to call him, attorney in this state chose that as a class action suit. In a large department store who has a million credit card holders, he filed a class action suit. We have gone in-- and the reason why he did it is because on the return envelope they used a P.O. box instead of a street address, which was called for and established law. So he used that as the error for his class action suit. What this amendment does is it goes in to that section that we amendment last session to say that you can use a post office box and that the name must appear so it would be an individual violation. I think it's acceptable to the author.

SPEAKER: It's acceptable to the author. Is there objection to adoption of the amendment? Chair hears none. The amendment is adopted. A question occurs on the adoption of the amendment as amendment. Is there objection? Chair hears none. Amendment as amended is adopted. Anyone wish to speak for or against? Question occurs on passage on House Bill 668. All those in favor say aye. Those opposed say no. House Bill 668 is passed and drawn. Mr. Hilbert.

[Session moves to House Resolution 762 and announcements to adjournment. Resumes 10:00 am following day.]

SPEAKER: House come to order. Members, please register. Quorum is present. The House and gallery please rise for the invocation to be given by Reverend James Utter, Rector of the Palmer Memorial Episcopal Church in Houston, Texas.

[Prayer]

SPEAKER: Chair announces signing the following in the presence of the House.

CLERK: HCR191, HCR165, HB462, HB44, SCR16, SB279, SB401, SB403, SB897

DOORKEEPER: Mr. Speaker.

SPEAKER: Mr. Doorkeeper.

DOORKEEPER: Mr. Speaker, I have a messenger from the Senate at the door of the House.

SPEAKER: Admit the messenger, Mr. Doorkeeper.

MESSENGER: Mr. Speaker, I'm directed by the Senate to inform the House that the Senate has passed the following: SB 374 by Armbrister relating to the review and continuation of certain state agencies. SB 628 by Madla relating to access to pharmaceutical services. SB 673 by Madla relating to health care. SB 1361 by Shapiro relating to the definition of the terms emergency medical care, emergency care and emergency services. SB 1596 by Leedom relating to arbitration of alleged violations of the law. SB 1618 by Armbrister relating to certification of providers by health maintenance organizations. SB 1637 by Sibley relating to the approval and use of certain life, health and accident insurance policy forms. Respectfully, Betty King, Secretary of the Senate.

SPEAKER: The following bills and resolutions, first reading reference to committee. Clerk will read the bills and resolutions.

CLERK: HCR 194 by Van de Putte designates May 9, 1995 as Texas Clinical and Nutrition Day for the committee of rules and resolutions. HR 781 by Greenberg in memory of Harriet Olson Nagle for the committee of rules and resolutions. HR 782 by Allen honoring the Truman Middle School participants for the committee of rules and resolutions. HR 783 by Counts in memory of Lawrence Mitchell Hall for the committee of rules and resolutions. HR 784 by Counts in memory of Elbert Benjamin Horton, Jr. for the committee of rules and resolutions. HR 786 by Madden honoring Sean Philip Glover for the committee of rules and resolutions. HR 788 by Kemple in memory of Evelyn Minor Morchis Randall for the committee of rules and resolutions. HR 789 by Joust proclaiming Gladewater as the antique capitol of east Texas for the committee of state and federal international relations. HR 790 by Joust honoring Dan Knoll for the committee of rules and resolutions. HR 791 by Cost honoring students from White Oak High School for the committee of rules and resolutions. HR 792 by Conley in memory of Paul Pettie for the committee of rules and resolutions. SB 94 by Ellis relating to regulation of political contributions for the committee on elections. SB 272 by Brady relating to formal charge of destruction of weapons for the committee for criminal jurisprudence. SB 558 by West relating to construction contract provisions for the committee on business and industry. SB 676 by Lucio relating to the punishment of death for the committee of criminal jurisprudence. SB 973 by Haywood relating to disclosure of certain information for the committee of public health. SB 1335 by Barrientos relating to the waiver and alternative use of municipal impact fees for the committee of urban affairs. SB 1346 by West et al relating to sports facilities for the committee of state affairs. SB 1377 by Wentworth relating to recreational assessments for the committee of land and resource management. SB 1492 by Shapiro relating to the information derived from an audit for the committee on ways and means.

[Actions on various bills, etc. to end of side A]

[Tape 104, Side B]

[Actions on various bills, etc.]

SPEAKER: Question on final passage of House Bill 1032. All those in favor vote aye. Opposed vote no. It is a record vote. The Clerk will ring the bell. Have all voted? There being 143 ayes and no nays, Senate Bill 1032 is finally passed. Chair lays out on third reading final passage of House Bill 668. Clerk read the bill.

CLERK: HB 668 by Junell relating to civil revenues for deceptive trade practices.

SPEAKER: Chair recognizes Mr. Junell.

JUNELL: Mr. Speaker, Members, this is deceptive trade practice that we had yesterday.

SPEAKER: Question occurred on final passage of House Bill 668. All those in favor say aye. Opposed no. The ayes have it. House Bill 668 is finally passed. Chair lays out on third reading final passage of House Bill 2441. Clerk read the bill.

[Actions on various bills continued to end of Tape 104, Side B]